IN THE

Supreme Court of the United States

October Term, 1962

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NATIONAL EQUIPMENT RENTAL, LTD.,

Petitioner,

—against—

STEVE SZUKHENT and ROBERT SZUKHENT,

Respondents.

PETITIONER'S BRIEF ON APPEAL

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PETITIONER'S BRIEF ON APPEAL

Opinions Below

United States District Court for the Eastern District of New York, Dooling, J., rendered an opinion and order entered in the office of the Clerk of the United States District Court for the Eastern District of New York on March 19, 1962, reported in 30 FRD 3.

United States Court of Appeals for the Second Circuit rendered an opinion dated December 6, 1962, reported in 311 F. 2d 79.

Jurisdiction

The judgment of the United States Court of Appeals for the Second Circuit was dated December 6, 1962, and the mandate entered in the office of the Clerk of United States

District Court for the Eastern District of New York on the 27th day of December 1962. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254 (1).

Constitutional and Statutory Provisions Involved

1. United States Constitution, Amendment V:

> "* * * nor shall any person * * *, be deprived of life, liberty or property, without due process of law; * * *."

2. Federal Rules of Civil Procedure, Rule 4 (d) (1):

> "(d) Summons: Personal Service * * *. Service shall be made as follows:
>
> (1) Upon an individual * * * by delivering a copy of the summons and of the complaint to an agent authorized by appointment * * * to receive service of process."

Question Presented

Was valid service of process effected upon the respondents by the service of the summons and complaint upon the person nominated and designated as their process agent in a written contract when actual notice of such service was given by both process agent and petitioner, even though the contract contained no provision requiring such notice.

Statement

The basis for federal jurisdiction in the Court of first instance is based on diversity of citizenship. Title 28 U.S.C. Section 1332.

Petitioner, a Delaware corporation with its principal place of business in New York, is in the business of purchasing equipment on its customers' orders for leasing to the customers on terms and conditions set forth in a written lease agreement. Respondents, residents of Michigan, obtained farm equipment from plaintiff pursuant to such lease, the last paragraph of which read:

> "This agreement shall be deemed to have been made in Nassau County, New York, regardless of the order in which the signatures of the parties shall be affixed hereto, and shall be interpreted, and the rights and liabilities of the parties here determined, in accordance with the laws of the State of New York; and the Lessee hereby designates Florence Weinberg, 47-21 Forty-first Street, Long Island City, N. Y., as agent for the purpose of accepting service of any process within the State of New York."

On January 24, 1962, the United States Marshal delivered two copies of the summons and complaint to the respondents' designated agent, Florence Weinberg, who promptly mailed them to respondents with a covering letter explaining that they had been served upon her as the respondents' agent, in accordance with the provisions of the lease. On the same day, petitioner itself notified respondents by certified mail of the service of process on Florence Weinberg.

The District Court, although finding that the clause appointing such agent "was no buried fine print clause", and "abundant actual notice of the service of process was promptly and punctiliously given in a manner that made the whole position plain to defendants at a glance" (R. 3a), nevertheless held service invalid and quashed it on the ground that the lack of provision in the contract that the

respondents be notified by the agent, of such service of process, rendered the provision therein, containing the appointment of person on whom process of service was to be served, ineffective.

The Court of Appeals for the Second Circuit, in affirming, determined that although a provision for such notice would be essential to the validity of a state statute providing for such substituted service on a statutory agent, conceded that there is no such requirement when individuals freely contract for a method of substituted service.

ARGUMENT

1. Service of process was effected in accordance with Rule 4 (d) (1) of the Federal Rules of Civil Procedure by serving a person designated to receive service of process in a contract freely negotiated and executed.

The contract was freely negotiated and executed, is unequivocal in its terms, required no construction and should, therefore, be enforced as executed.

The law is well established that citizens of different states may agree in advance that any dispute arising out of the commercial transaction between them shall be subject to the jurisdiction of the Courts of a designated state. *United States* v. *Balanovski*, 236 F. 2d 298 (2d Cir. 1956); *Kenny Construction Co.* v. *Allen*, 248 F. 2d 656 (D.C. Cir. 1957); *Erlanger Mills, Inc.* v. *Cohoes Fibre Mills, Inc.*, 39 F. 2d 502 (4th Cir. 1956); *Bowles* v. *J. J. Schmitt & Co., Inc.*, 170 F. 2d 617 (2d Cir. 1948); *Gilbert* v. *Burnstine*, 255 N. Y. 348, 174 N.E. 706 (1931); Restatement, Conflicts Sec. 81; Re-

statement, Judgments Sec. 18; cf *Adam* v. *Saenger*, 303 U. S. 59 (1938).

Significantly, the contract provided that it was deemed to have been made in the State of New York and the rights and liabilities of the parties determined in accordance with the laws of the State of New York.

It was, in this connection, that provision was made for authorizing service of process upon a person in the State of New York.

In a recent proceeding in the Supreme Court of the State of New York, involving this petitioner, where an application was made to quash service, the court in *National Equipment Rental, Ltd.* v. *Graphic Art Design*, 234 N. Y. S. 2d 61 at 63 held:

> "Insofar as service of process is concerned, the question has been resolved by this court (Widlitz, J.) in National Equipment Rental, Ltd. v. Boright, N. Y. Law Journal, July 17, 1962, pgs. 8-9 in which, in construing a similar designation of an agent to receive service of process, the court said:
>
> 'The instant situation concerns contractual designation. The propriety of service in accordance with an advance designation has been upheld in Gilbert v. Burnstine (255 N. Y. 348, 174 N.E. 706, 73 A.L.R. 1453), Emerson Radio & Phonograph Corporation v. Eskind (32 Misc. 2d 1038, 228 N. Y. S. 2d 841), National Equipment Rental, Ltd. v. Karlin (6 Misc. 2d 128, 166 N. Y. S. 2d 27).' Accordingly, to the extent that the motion seeks to set aside service of the summons as insufficient, it is denied.
>
> " • • • Not only was the basic contract made in New York, but the parties stipulated that it should be interpreted and the rights and liabilities of the par-

ties determined in accordance with the Laws of the State of New York, and the contract made provision for acquiring personal jurisdiction of the defendants in New York. Express stipulations in furtherance of business convenience or necessity and voluntarily made should not be lightly disregarded. Consents contained in the basic agreement necessarily implied that New York would be the forum for litigation. The intent of the parties thus expressed or implied will not be frustrated nor the plaintiff's choice of forum disturbed. (* * *)."

In *Gilbert* v. *Burnstine*, 255 N. Y. 348, the Court at 354, held:

"Contracts made by mature men who are not wards of the Court should, in the absence of potent objection, be enforced. Pretexts to evade them should not be sought. Few arguments can exist based on reason or justice or common morality which can be invoked for the interference with the compulsory performance of agreements which have been freely made. Courts should endeavor to keep the law at a grade at least as high as the standards of ordinary ethics. * * *."

The Court, quoting with approval from Scott Fundamentals of Procedures, pages 39-41, held:

"'Jurisdiction is conferred when the defendant enters a general appearance in an action, that is, an appearance for some purpose other than that of raising an objection of lack of jurisdiction over him. A stipulation waiving service has the same effect. The defendant may, before suit is brought give a power of attorney to confess judgment or appoint an agent to accept service, or agree that service by any other

> method shall be sufficient. The defendant in all these cases has submitted to the control of the State and the Court over him.' "

The requirement by the Court below that the contract incorporate an intrinsic provision for reasonable notification in order to render the designation of an agent enforceable, is in direct conflict with *Green Mountain College* v. *Levine*, 139 A. 2d 822, 120 Vt. 332; *Kenny Construction Co.* v. *Allan*, D.C. Cir. 1957, 248 F. 2d 656, in each of which cases, the court held that the danger that the agent so designated might not forward notice to the defendants were risks that they took in appointing such agent.

See also *Patterson* v. *U. S.*, 79 S. Ct. 936, 359 U. S. 495; *Robert C. Herd & Co.* v. *Crawill Machinery Corp.*, 79 S. Ct. 763, 359 U. S. 297; *Mitchell* v. *Kentucky Finance Co,*, 79 S. Ct. 756, 359 U. S. 29; *Romero* v. *International Terminal Operating Co.*, 79 S. Ct. 468, 358 U. S. 354.

At the time of the execution of the contract, the respondents herein did not challenge any of its terms and in fact, had the respondents insisted on the elimination of the clause designating the agent, the petitioner would not have entered into the contract.

This Court in *Upton* v. *Tribilcock*, 91 U. S. 45, the Supreme Court held at page 50:

> "It will not do for a man to enter into a contract, and, when called upon to respond to its obligations to say that he did not read it when he signed, or did not know what it contained. If this were permitted contracts would not be worth the paper on which they are written. Such is not the law. A contractor must stand by the words of his contract, and, if he will not

> read what he signs, he alone is responsible for his omission."

In *Hill* v. *Syracuse R. Co.*, 73 N. Y., the Court at 353 held:

> "By accepting the contract without objection, the other party had a right to assume that he assented to its terms and the fact of not reading it cannot be interposed to prevent the legal effect of the transaction. Long v. N. Y. C. R. Co., 50 N. Y. 76; Belger v. Dinsmore, 37 N. Y. 166; Steers v Liverpool, etc. S. S. Co., 57 N. Y. 1; Magee v. C & R Tr. Co., 45 N. Y. 514."

In *Chicago R. Co. v. Belliwith*, 83 Fed. 437, the Court at 439 stated:

> "A written contract is the highest evidence of the terms of an agreement between the parties to it and it is the duty of every contracting party to learn and know its contents before he signs and delivers it. He owes this duty to the other party to the contract, because the latter may, and probably will, pay his money and shape his action in reliance upon the agreement. He owes it to the public, which, as a matter of public policy, treats the written contract as a conclusive answer to the question, what was the agreement?"

The petitioner herein relied on all of the terms of the contract, paid its money for equipment specifically requested by respondents who should be bound to all of the terms of the contract which should be held valid in all respects.

Process was effected exactly as required under Rule 4 (d)(1) of the Rules of Civil Procedure. Actual notice of the service was given to the respondents. The effect of the decision of the Court below is to nullify the language of the rule and to deprive the petitioner of due process under the Fifth Amendment of the Constitution. Inasmuch as Rule 4 (d)(1) of the Federal Rules of Civil Procedure does not require that the agent be under an obligation to send notice of services of process, the interpretation by the Court below that it does require such notice does violence both to the unequivocal provision of the contract between the parties as well as to the letter of the rule.

The results of the construction placed upon this significant paragraph by the Court below was, in effect, to make a new contract between the parties. The petitioner herein purchased the equipment leased to the respondents, predicated upon the contract and in reliance upon its ability to obtain jurisdiction over the respondents in Courts in its own local area. It would not have made the contract otherwise. By the construction placed upon the paragraph in question, the Court below has effectively deprived the petitioner of its rights under the contract without due process of law. Moreover, as pointed out in the dissenting opinion in the Court below:

> "To allow a defendant to insist upon what the majority here holds to be a defect in this privately drafted and voluntarily agreed to agency appointment, even though he has in no way been prejudiced thereby, is the essence of formalism. The purpose of service of process is to apprise the defendant that suit has been brought against him and to give him an opportunity to defend (citing cases). Once it is

found that that purpose has been served, the inquiry should come to an end." (R. 30)

In the landmark case of *Pennoyer* v. *Neff*, 95 U. S. 714, 735, the Supreme Court held:

> "It is not contrary to natural justice that a man who has agreed to receive a particular mode of notification of legal proceedings should be bound by a judgment in which that particular mode of notification has been followed, even though he may not have actual notice of them."

The result of the determination by the Court below is, in the words of the opinion of Judge Moore, dissenting therefrom, to throw

> "in doubt the validity of countless provisions of a similar nature and throws the law into a state of confusion and uncertainty." (R. 32)

Since the contract provides "that the laws of the State of New York are applicable thereto", the decisions of the highest Court of the State of New York bear examination. They hold that a Court cannot make a new contract for the parties under the guise of interpreting the writing. *Central Union Trust Co.* v. *Trimble*, 255 N. Y. 88, 174 N.E. 72; *Western Union Telegraph Co.* v. *American Comm. Assoc.*, 299 N. Y. 177, 86 N.E. 2d 162. Only where the language of the contract is ambiguous and uncertain and susceptible of more than one construction may the Court interfere to reach a proper construction of that which is uncertain.

The respondents themselves submitted no affidavits in support of their application to quash service, nor does the record reveal any personal claim on their behalf that they were imposed upon.

A Court cannot make a new contract for the parties under the guise of interpreting the writing. *Friedman* v. *Handelman*, 300 N. Y. 188, 194, 90 N.E. 2d 31; *Brown* v. *Manufacturers Trust Co.*, 278 N. Y. 317, 16 N.E. 2d 350; *Graf* v. *Hope Building Corp.*, 254 N. Y. 1, 4, 171 N.E. 884; *Heller* v. *Pope*, 250 N. Y. 132, 164 N.E. 881; *Fleetash Realty Co.* v. *August Severio Construction Co.*, 21 Misc. 2d 350, 188 N. Y. S. 2d 714, 716, aff'd 11 A.D. 2d 769, 205 N. Y. S. 2d 212; *Frankel* v. *Tremont Norman Motors Corp.*, 21 Misc. 2d 20, 193 N. Y. S. 2d 722, 725, aff'd 10 A.D. 2d 680, 197 N. Y. S. 2d 576, aff'd 8 N. Y. 2d 901, 168 N.E. 2d 823. The Court must construe an agreement as made and may not make a new agreement by construction. *Sandberg* v. *Reilly*, 223 A.D. 57, 227 N. Y. S. 418. Parties may make their own bargains and they should be held to the terms of their agreement. *Cohen* v. *E. & J. Bass*, 246 N. Y. 270, 158 N.E. 618. A poor bargain may not be made good by judicial construction or recasting of the contract since it is a fair and reasonable assumption that a party has made what he believed to be the best bargain which he could obtain in his own interest. *Lexington Holding Corporation* v. *Holman*, 189 N. Y. S. 2d 269, 270. Where the intention of the parties, as in the case at bar, is clear and unambiguously set forth, effect must be given to the intent as indicated by the language used. *Delancey Kosher Restaurant and Caterer Corporation* v. *Gluckstern*, 305 N. Y. 250, 256, 112 N.E. 2d 276. The intention of the parties is found in the language used to express such intention. *Nau* v. *Vulcan Rail & Construction Co.*, 286 N. Y. 188, 198, 199, 36 N.E. 2d 106. The agreement of the parties is to be ascertained from the plain language used by them no matter what the intention. Presumptively, the intention

of the parties to a contract is expressed by the natural and ordinary meaning of their language referable to it and such meaning cannot be perverted or destroyed by the Courts through construction. *Gans* v. *Aetna Life Insurance Co.*, 214 N. Y. 326, 108 N.E. 443. The law presumes that the parties understood the import of their contract and that they had the intention which its terms manifested. *Cream of Wheat Co.* v. *Arthur H. Christ Co.*, 222 N. Y. 487, 493, 494, 119 N.E. 74.

If private contracts which are not in conflict with the public policy of the States or Nation are to be inhibited by judicial construction, the entire concept of free interstate commerce will be frustrated. The decision of the Court below is a deterrant to interstate commerce.

The court below indicated that the "plaintiff might have provided with the defendant's agreement that service or notice be waived * * *". "This would, however, have required defendant's consent which might or might not have been forthcoming." (R. 26)

It seems anomalous for the Court on one hand to have held that the defendants' consent to the designation of a specific individual upon whom service of process was to be made is unenforceable even though notice was actually given by such appointee, while holding that a similar consent to the waiver of either service or of notice would have been enforceable. Such holding is illogical and should, therefore, not be sustained.

2. There is no requirement in the contract nor in law for an agent designated for a specific purpose to be subject to the control of the person for whom he acts.

The use of the word "agent" in the contract is to be interpreted within the context of the instrument in which it is used. In the case at bar, the sole purpose of the use of the word "agent" was to accomplish the result of subjecting the respondents to the jurisdiction of the Courts within the State of New York. Compare, for example, Restatement of Law of Agency, 2d Section 1f, dealing with the statutory use of the word "agent". It is there stated:

> "Thus, the purpose of statutes providing substituted service of process on a public official is to satisfy the due process requirement of the United States Constitution. Although such a statute may label the public official as an 'agent' for receiving service of process, he is not an agent in the sense used herein. He is not, in fact, designated by the one whose account he 'accepts service', nor does he respond to that person's directions. * * * ".

It may, therefore, be said that an agency such as the one before the Court is not one in which the agent is necessarily designated by the one on whose account he accepts service, nor is he required to respond to such person's directions. Whereas, in the case of a statute, the Constitution requires notice be given by the public official designated by statute, the same inhibitions do not apply to individual citizens. This distinction was recognized by the majority in the Court below, where the court said, referring to such requirement:

"There is no such requirement when individuals freely contract for a method of substituted service." (R. 15)

Other illustrations may be given where a person acts for another although not under such other person's control. For example, a confession of judgment, a cognovit note or an escrow agreement.

Restatement of Law of Agency, 2d Section 15 provides: "An agency relation exists only if there has been a manifestation by the principal to the agent that the agent may act on his account, and consent by the agent so to act."

The respondents manifested such intention by executing the agreement wherein such designation was made. The designee manifested her consent in conformity with Comment B of the aforementioned section, by accepting the service and by notifying the respondents that such service had been effected.

The agent so designated had the capacity to hold the power to act on behalf of the respondents and did so act and, therefore, came completely within the purvue of Section 21 of the aforementioned Restatement of the Law of Agency.

Under all of the circumstances, therefore, the agency created in the contract was valid, was acted upon and should be upheld.

CONCLUSION

The judgment appealed from should be reversed in all respects and the matter remitted to the District Court for further proceedings.

Respectfully submitted,

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